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Please Senator, I Want Some More: The General Assembly Gets an F form the DeRolph Court

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PLEASE SENATOR, I WANT SOME MORE: THE GENERAL ASSEMBLY GETS AN "F" FROM THE *DEROLPH* COURT

I. INTRODUCTION

Picture a child attending school in the middle of winter. The building is poorly heated; but the cold has its advantages, for it keeps away the cockroaches that infest the school during the warmer months. Also, since the building is too cold to melt the snow on the roof, it keeps the roof from leaking the way it does after a spring rain. The child is coughing, but she does not know if her cough is from a cold, or from the kerosene fumes or coal dust that pervade the air of the school.

If you had to guess the time and place from which this "picture" might have been taken, you might be inclined to guess eighteenth-century England, recalling the story of *Oliver Twist*.[1] This "picture" however, was actually taken from the schools in the State of Ohio in 1993. Many of Ohio's schools are in a time of crisis, operating under poverty conditions in crumbling school buildings. The victims of this crisis have neither vote nor voice in the General Assembly. The political clamor of other, more "adult" interests, too often deafens legislative ears to the requests of school pupils.

On March 24, 1997, the Ohio Supreme Court took an important stand against the impoverishment of our state's schools. In *DeRolph v. State*,[2] the court held that because the state school funding system fails to meet the constitutional mandate to provide a "thorough and efficient" system of public schools.[3] In so holding, the court joined fourteen other states[4] in ruling that a state school

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[1] CHARLES DICKENS, OLIVER TWIST (Charles Dickens ed., Bantam 1981) (1833).

[2] 677 N.E.2d 733 (Ohio 1997).

[3] *Id.* (citing OHIO CONST. art. VI, § 2).

[4] *See, e.g.*, Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Secretary, Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Helena Elementary Sch. Dist. No. One v. State, 769 P.2d 684 (Mont. 1989); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777

funding system violates state constitutional provisions.[5] The decision to attack the legislature directly, striking down so many statutes at once, was a bold but necessary step toward assuring a better future for Ohio's children.

Part II of this Comment will describe the procedural history of the *DeRolph* matter. Part III will discuss the majority opinion and its rulings on the justiciability of the matter, the inadequacies of Ohio's school funding system, and the history of the law's treatment of education funding in Ohio. Part IV will address the concurrences, which expand on the history of education funding and suggest other constitutional violations by the statutes stricken by the majority opinion. Part V will examine the dissent and expound upon the errors in its reasoning.

II. PROCEDURAL HISTORY

In 1991, four of the poorest school districts in Ohio filed a lawsuit, naming, among the defendants, the Ohio Board of Education and the Ohio Attorney General.[6] The Districts sought injunctive and declaratory relief. The Districts further asked that the court declare the state funding system unconstitutional and enjoin further spending until the funding system passed constitutional muster.[7] The trial was a gargantuan affair in which sixty-one witnesses offered evidence, approximately four hundred and fifty exhibits were introduced, and over five thousand six hundred pages of transcript were generated.[8] The Perry County Court of Common Pleas found the state's school funding system to be unconstitutional, and it ordered the Board of Education to prepare proposals to the General Assembly that would pass constitutional muster, retaining juris-

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S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. One of King County v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelley, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. One v. Herschler, 606 P.2d 310 (Wyo. 1980). *DeRolph*, 677 N.E.2d at 741 n.6.

[5]The *DeRolph* court struck the following provisions as unconstitutional: 1) OHIO REV. CODE ANN. § 133.301 (Banks-Baldwin 1996) (which grants school districts the authority, and in fact requires school districts, to borrow against the income of future school years); 2) OHIO REV. CODE ANN. §§ 3313.482, 3313.487, 3313.488, 3313.489 and 3313.4810 (Banks-Baldwin 1996)(the emergency school assistance loan provisions); 3) OHIO REV. CODE ANN. §§ 3317.01, 3317.02, 3317.022, 3317.023, 3317.024, 3317.04, 3317.05, 3317.051 and 3317.052 (Banks-Baldwin 1996)(the School Foundation Program, which provides for the distribution of state aid to public schools); and 4) OHIO REV. CODE ANN. § 3318 (Banks-Baldwin 1996)(the Classroom Facilities Act, "to the extent that it is underfunded"). *DeRolph*, 677 N.E.2d at para. one of the syllabus.

[6]*Id.* at para. four of the syllabus.

[7]The districts were Youngstown in Mahoning County, Lima in Allen County, Dawson-Bryant in Lawrence County and Northern Local in Perry County. *DeRolph*, 677 N.E.2d at para. two of the syllabus.

[8]*Id.* Indeed, the Ohio Supreme Court case was a massive affair in and of itself, with amicus curiae briefs filed by parties as diverse as the AFL-CIO, the American Civil Liberties Union, various state and federal legislators, teachers' unions, physically challenged children's organizations and Governor Voinovich. *Id.* at 736.

diction to review the new legislation.[9] The Ohio Attorney General filed an appeal, despite the fact that the State Board of Education voted against appealing the decisions.[10]

The Fifth District Court of Appeals reversed the trial court.[11] The appellate court held that the trial court exceeded its authority in requiring new legislation of the General Assembly, stating that the trial court lacked the power to "effectively legislate school funding."[12] The appellate court further held that the state funding system did not violate the Ohio Constitution.[13]

The Fifth District Court, though it upheld the constitutionality of the state school funding system, made it clear that the decision was one forced upon it by a prior decision of the Ohio Supreme Court; namely, *Board of Education v. Walter*.[14] The court stated that "[t]he law enunciated in *Walter* is binding upon the trial court and upon this court and only the Supreme Court and the General Assembly can change Ohio Law."[15]

In *Walter*, the Ohio Supreme Court held that because the funding system in force in 1979 "ensure[d] that each child receives an adequate education," the system comported with article VI, section 2 of the Ohio Constitution.[16] Heedless of this binding authority, the Fifth District Court refused to hold—despite descriptions of squalid, freezing, insect-infested schools and students studying in squalor—that children in the 1990's were being denied an adequate education.[17]

III. JUSTICE SWEENEY'S MAJORITY OPINION

After relating the procedural history of the case, Justice Sweeney quickly put to rest the question of whether the court had jurisdiction to decide the case.[18] None of the parties to the supreme court appeal disputed the fact that the state's

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[9] DeRolph v. State, No. 22043 (Perry C.P. Ct. July 1, 1994), *aff'd in part, rev'd in part*, DeRolph v. State, No. CA-477, 1995 WL 557316, at *1 (Ohio Ct. App. 1995).

[10] *DeRolph*, 677 N.E.2d at 735.

[11] *DeRolph*, 1995 WL 557316 at *11. The appellate court affirmed the trial court in part, overruling assignments of error that asserted the trial court acted unreasonably, that the trial court found the state funding system also violated the constitutional protection of freedom of religious belief and that the trial court should have dismissed the action for improper venue. *Id.*

[12] *Id.*

[13] *Id.*

[14] *DeRolph*, 1995 WL 557316 at *2 (citing Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979)).

[15] *Id.* at *3.

[16] *Walter*, 390 N.E.2d at 825.

[17] *DeRolph*, 1995 WL 557316 at *3.

[18] DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997).

system of funding was inadequate to meet the needs of its students.[19] The issue before the supreme court was whether the funding system was so inadequate that it violated the "thorough and efficient" clause of the state constitution.[20] Precedent and the Ohio Revised Code provide that the acts of the General Assembly are presumed to be constitutionally valid.[21] This presumption, however, is rebuttable, and article IV of the state constitution provides that the court will decide questions of public or great general interest.[22] The majority properly recognized its constitutional duty to evaluate the mandates of the General Assembly—a duty that has followed the judiciary since the United States Supreme Court decided *Marbury v. Madison*[23] nearly two centuries ago.[24] "We will not dodge our responsibility," Justice Sweeney vowed, "by asserting that this case involves a nonjusticiable political question."[25] The *Walter* court had asserted its authority to decide upon the constitutionality of school funding,[26] and the *DeRolph* court relied on this precedent to make its own constitutional determinations.[27]

Justice Sweeney then analyzed the state school funding system. Our schools rely primarily on two sources of revenue: state aid and local tax levy funds.[28] The statutes provide a formula for determining the amount of state aid each school district will receive.[29] This formula, according to the court, is a flawed method for determining the amount of money needed by a school district.[30]

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[19] *Id.* at para. four of the syllabus.

[20] *Id.*

[21] *Id.* at 737 (citing OHIO REV. CODE ANN. § 1.47(A); Adamsky v. Buckeye Local School Dist., 653 N.E.2d 212 (Ohio 1995)).

[22] *DeRolph*, 677 N.E.2d at 737 (citing OHIO CONST. art. IV, § 2(B)(2)(d)).

[23] 5 U.S. (1 Cranch) 137 (1803).

[24] *DeRolph*, 677 N.E.2d at 737.

[25] *Id.*

[26] Board of Educ. Sch. Dist. of the City of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979).

[27] *DeRolph*, 677 N.E.2d at 741.

[28] *Id.* at 738. Section 3317.01 (A) of the Ohio Revised Code requires a school district to tax at a rate of twenty mills (or two percent of the total taxable property value of the district) to qualify for state aid. OHIO REV. CODE ANN. § 3317.01 (Banks-Baldwin 1996).

[29] Section 3317.022(A) of the Ohio Revised Code contains the following formula for determining how much money a district will receive:

> (School District Equalization Factor X Formula Amount X Average Daily Membership) - (.02 X Total Taxable Property Value of District) = State Aid.

OHIO REV. CODE ANN. § 3317.022(A).

[30] First, the School District Equalization Factor, or "cost of doing business" factor is adjusted by county, disregarding the actual costs of educating children in individual districts. *DeRolph*, 677 N.E.2d at 738. Second, the formula amount, according to

The court opined that the system, in its present form, institutionalizes wealth-based disparities in Ohio schools.[31] Moreover, the state funding system is hampered by other provisions in the Ohio Revised Code, which prevent a school district from collecting the funds it needs to operate.[32] Schools that cannot meet their operating expenses by tax levies and state aid are required to borrow money, first against future earnings[33] and then from commercial lenders.[34] Such borrowing ultimately puts a school district further behind in its funding efforts for subsequent years, leading to a downward spiral of debt.[35]

DeRolph turned on only a few words of text in the state constitution. Article VI, section 2 of the Ohio Constitution reads, "[t]he general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a *thorough and efficient* system of common schools throughout the State."[36] The precise

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testimony at the trial, depends more on political concerns than upon actual education costs, being determined *after* the legislature determines the total amount of money from the state budget that will be devoted to education. *Id.* Third, the equation fails to properly distribute sufficient funds for special programs. *Id.*

[31] *Id.* at 737. The system fails to properly distribute sufficient funds for special programs like special education, Aid to Dependent Children (ADC), transportation, and vocational education. Funds for physically challenged students are distributed by section 3317.05 of the Ohio Revised Code at a flat rate per physically challenged student, without taking into account the actual needs of the physically challenged child. *DeRolph*, 677 N.E.2d at 738. Wealthier districts are in a better position to take care of physically challenged students with unusually costly educational needs. *Id.* In addition, section 3317.023(B) of the Ohio Revised Code which distributes funds according to the concentration of children on ADC, distributes only enough funds to any school district to pay for a twenty percent concentration of ADC children. *DeRolph*, 677 N.E.2d at 739 (citing OHIO REV. CODE ANN. § 3317.023(B)). If a school district had more than twenty percent of its pupils on ADC, it had to make up the difference in funding. *DeRolph*, 677 N.E.2d at 739. The poorest districts, of course, will most likely have the highest concentrations of ADC pupils.

[32] The state aid equation subtracts two percent of a school district's total taxable property value from the amount of aid which a school district will receive. OHIO REV. CODE ANN. § 3317.022(A) (Banks-Baldwin 1996). This figure is supposed to correspond to the twenty mills of tax effort that a district must achieve in order to qualify for aid. Section 319.301 of the Ohio Revised Code, however, provides for the reduction of property values for tax purposes in the face of property value inflation. OHIO REV. CODE ANN. § 319.301(D). Even though a school may tax at twenty mills, it does not collect the full two percent of the actual taxable property value of the district. *DeRolph*, 677 N.E.2d at 739. Nonetheless, the formula in section 3317.022(A) subtracts two percent of the unreduced property value of the district. Thus, a school is expected by the above equation to have more tax dollars at its disposal than section 319.301 actually allows. *Id.* (citing OHIO REV. CODE ANN. §§ 319.301, 3317.022(A)).

[33] The "spending reserve loan," as required by section 133.301 of the Ohio Revised Code. *DeRolph*, 677 N.E.2d at 739.

[34] *Id.* (citing OHIO REV. CODE ANN. § 3313.483).

[35] *Id.* at 740.

[36] *Id.* (citing OHIO CONST. art. VI, § 2) (emphasis added).

meaning of the words "thorough and efficient" forms the essence of the *DeRolph* opinion.

Justice Sweeney began his analysis by recalling the history of the formation of the Ohio Constitution, noting that the delegates to the 1850-51 Ohio Constitutional Convention repeatedly "stressed the importance of education."[37] The record of the constitutional debates demonstrated "the delegates' strong belief that it is the *state's* obligation . . . to provide for the full education of all children within the state."[38]

The constitutional debates were also employed as a source of authority by the Ohio Supreme Court in *Miller v. Korns*,[39] which observed:

> [T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state. A thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part or any number of the school districts of the state lacked teachers, buildings, or equipment.[40]

The facts in *DeRolph* clearly indicated that the present funding system *is* one in which districts are starved for funds, teachers, buildings, and equipment. Justice Sweeney's majority opinion, as well as Justice Douglas' concurring opinion, are rife with facts depicting the squalid conditions in which many of our state's students are compelled to attend classes.[41] The trial record demonstrated that some children were attending classes in a school building that was sliding down a hill at the rate of an inch per month.[42] Districts have had to convert windowless storage rooms, closets, and even a coal bin into classrooms.[43] One school district had a building with a wheelchair-inaccessible basement library, which physically challenged students had to be carried to.[44] Testimony described buildings with crumbling walls, falling plaster, cockroach-infested floors, and roofs that leaked water through the ceiling "like a waterfall."[45]

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[37] *Id.*

[38] *DeRolph*, 677 N.E.2d at 740-41.

[39] 140 N.E. 773 (Ohio 1923).

[40] *Id.* at 776; *DeRolph*, 677 N.E.2d at 741.

[41] *DeRolph*, 677 N.E.2d at 742, 762.

[42] *Id.* at 743.

[43] *Id.*

[44] *Id.*

[45] *DeRolph*, 677 N.E.2d at 744. As the reader can see, the conditions related in paragraph one of this Comment are not entirely fictitious. In fact, the actual conditions of some of Ohio's schools are worse than those in the works of Charles Dickens. *Id.* at 743. Dickens's "[p]lease, sir, I want some more" scene from the school dining area in

The plight of the schools went beyond the poor condition of the buildings. Districts were too short of funds not only to hire experienced teachers, but to hire enough teachers to comply with state regulations determining teacher-student ratios.[46] Schools lacked the funds necessary to buy new textbooks or provide supplies for classrooms such as paper clips, chalk, and even toilet paper.[47] The students in Ohio's poorer schools could not hope to keep pace with technological development because the schools cannot afford computers and related supplies.[48] The effect of this deprivation had a direct impact on educational performance.[49] In these poorer districts, as many as thirty percent of seniors failed their ninth-grade proficiency tests.[50]

Justice Sweeney rejected the contention that *Walter* controlled in this case and dictated a judgment upholding the state school funding system.[51] *Walter*, according to Justice Sweeney, was distinguishable for two reasons. First, the *Walter* court ruled upon the constitutionality of only a single aspect of state funding, while the *DeRolph* court had to adjudicate an attack on the entire system.[52] Second, the single aspect of school funding that was upheld by the *Walter* court contained a provision promising "the same number of dollars per pupil, in state and local funds combined, for each mill of local property tax effort [the 'equal yield formula']."[53] Shortly after the *Walter* decision was handed down, the General Assembly repealed this "equal yield formula."[54]

The majority opinion is more than fair to the General Assembly. The General Assembly itself admitted, however, that it failed, despite the passage of supplementary distributions during the pendency of the case, to enact legislation that would provide proper school funding.[55] Intervention and pressure from the Ohio Supreme Court are necessary to get the state legislature

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Oliver Twist, DICKENS, *supra* note 1, at 13, would be impossible in some Ohio schools, because those school cannot *afford* dining areas!

[46] Section 3301-35-03(A)(3) of the Ohio Administrative Code (Anderson 1996) sets a maximum teacher-student ratio of 1:25, but some classes in the plaintiff school districts have as many as thirty-nine students in a single classroom. *DeRolph*, 677 N.E.2d at 744 (citing OHIO ADMIN. CODE § 3301-35-03(A)(3) (1996)).

[47] *DeRolph*, 677 N.E.2d at 744.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *DeRolph*, 677 N.E.2d at 746.

[52] *Id.* at 745.

[53] *Id.* (citing Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979)).

[54] *Id.* (citing *Walter*, 390 N.E.2d at 813).

[55] Thirty-seven lawmakers, in an amicus curiae brief, admitted that the state funding system was insufficient to provide for Ohio's pupils. *DeRolph*, 677 N.E.2d at 746.

to give a high priority to the task. "[U]nless this court rules in favor of [the school districts]," Justice Sweeney cautioned, "the urgency of resolving public school funding will quickly fade."[56] The *DeRolph* court, by giving the school districts their victory, will not give the issue the opportunity to fade.

The General Assembly still has wide latitude in which to act. There is nothing wrong, Justice Sweeney said, with disparity of wealth among school districts.[57] Indeed, the *DeRolph* court expressly repudiated "a 'Robin Hood' approach to school financing reform."[58] The court did not even require that a spending ceiling be established for more affluent school districts.[59] Instead, the court gave the legislature a brief but clear instruction regarding what system will pass constitutional muster. "A thorough and efficient system of common schools," Justice Sweeney instructed, "includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner."[60]

Justice Sweeney's directive was the proper one to give to the General Assembly. The instruction allows the legislature freedom to operate while setting a clear minimum which must be achieved.

IV. THE CONCURRENCES

Each of the justices in the majority supported Justice Sweeney's opinion.[61] Justices Resnick and Pfeiffer wrote brief concurring opinions. Justice Resnick emphasized that while equality among the schools was not necessary, the General Assembly must determine the basic cost of educating a child and then devise a funding system that does not rely so heavily on property taxes.[62] Justice Pfeiffer stated that the disparities of funding among school districts were not the result of a lack of commitment on the part of the districts themselves.[63] Property owners in some school districts paid high rates of property taxes, yet the schools did not receive much revenue because of low property values.[64]

Justice Douglas's concurrence forms the bulk of the *DeRolph* opinion. Justice Douglas reasoned that education in Ohio is a fundamental right and that the school funding system violated more than the "thorough and efficient" clause

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[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *DeRolph*, 677 N.E.2d at 746.

[60] *Id.* at 747.

[61] *Id.* at 748 (Douglas, J., concurring).

[62] *Id.* at 780 (Resnick, J., concurring).

[63] *Id.* (Pfeiffer, J., concurring).

[64] *Id.*

of the Ohio Constitution.[65] He also discussed further reasons why the state funding system violated the "thorough and efficient" clause.[66]

Justice Douglas's opinion restated the justiciability of the subject matter and described in detail the School Foundation Program.[67] Justice Douglas also discussed the Classroom Facilities Act,[68] which allows school districts, under an "extremely complicated" process, to obtain state assistance for the construction of school facilities.[69] The system was hopelessly underfunded. The most recent listing of districts eligible for funds included forty-four school districts, but only eighteen of the districts had actually received any funds for school construction.[70] The parties at trial stipulated that a little over two million dollars had been made available under the Act. A survey by the Ohio Board of Education, however, showed that over ten *billion* dollars was needed for facilities construction and repair statewide.[71]

Justice Douglas's discussion of the history of public education began by describing legislative action that predated the foundation of the State of Ohio.[72] Congress provided for the reservation of real estate for the funding of schools within the Northwest Territory.[73] The 1802 state constitution contained language that forbade the legislature from passing any law that would deny the poor equal participation in the schools.[74] During the Ohio Constitutional Convention Debates of 1850-51, several legislators voiced a firm belief that denying any class of students an equal chance at an education would hinder the moral and social development of Ohioans as a whole.[75]

In light of the history of legislative commitment to educational funding, and given the fact that one-third of the state budget and an entire article of the state constitution are devoted to education,[76] Justice Douglas agreed with the trial

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[65] *DeRolph*, 677 N.E.2d at 748 (Douglas, J., concurring).

[66] *Id.* at 751.

[67] OHIO REV. CODE ANN. §§ 3317.01-3317.67 (Banks-Baldwin 1996).

[68] OHIO REV. CODE ANN. §§ 3318.01-3318.41.

[69] *DeRolph*, 677 N.E.2d at 755.

[70] *Id.* The Ohio Department of Education prioritized the list based on the number of inadequately housed children per district. "All of the pupils identified as 'improperly housed' in 1989 in districts that have not received Classroom Facilities Act assistance continue to be improperly housed unless the school district has provided facilities without state assistance." *Id.* at 756.

[71] *Id.*

[72] *DeRolph*, 677 N.E.2d at 768.

[73] *Id.*

[74] Id. (citing OHIO CONST. 1802 art. VIII, § 25).

[75] *Id.* at 770.

[76] *DeRolph*, 677 N.E.2d at 776.

court, which held that education is a fundamental right in Ohio.[77] Consequently, Justice Douglas believed that the disparities created by the state funding system violate the Equal Protection Clause of the Ohio Constitution.[78]

Justice Douglas also agreed with the trial court's finding that the virtue of local control, so valued by the dissent, is in fact an illusion for those school districts that are in desperate financial condition.[79] Near the end of his opinion, he wrote, "[t]he fact that school districts have the 'ability' to determine how dollars are spent in some circumstances is a hollow argument when there are not sufficient funds. . . ."[80] Justice Douglas's opinion provides a lengthy, but strong support for the principles espoused by Justice Sweeney.

V. THE DISSENT

The dissent was willing to give some leeway in light of recent attempts by the General Assembly, in the form of bills passed during the pendency of the *DeRolph* case, to ameliorate the problem.[81] The majority, however, rejected this contention, not only because the court should only look to the record to decide the case, but also because the plain facts before the court showed that school districts still lacked sufficient funds.[82] "[T]he evidence," Justice Sweeney countered, "clearly indicates that the funding level set by today's School Foundation Program has absolutely no connection with what is necessary to provide each district enough money to ensure an adequate educational program."[83] Justice Moyer, while accusing the majority of exceeding its authority by deciding the case, exceeded *his* own authority by deciding the case on facts outside the record.

Justice Moyer argued that what constitutes a "thorough and efficient" education should be left solely to "the collective will of the people through the legislative branch."[84] Admirable though this deference to the people's will may sound, the legislature's apparent definitions of thoroughness and efficiency must include letting children study in bitterly cold classrooms or classrooms filled with kerosene fumes. The court should take an active role and compel the legislature to correct the deficiencies of the funding system to keep children from studying in squalor. The dissent's willingness to pass on the question of the schools is unconscionable judicial cowardice.

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[77] *Id.*

[78] *Id.* (citing OHIO CONST. art. I, § 2. This article provides that the "government is instituted for [the people's] equal protection and benefit.").

[79] *Id.* at 777.

[80] *DeRolph*, 677 N.E.2d at 777.

[81] *Id.* at 787 (Moyer, C.J., dissenting).

[82] *Id.* at 742.

[83] *Id.*

[84] *DeRolph*, 677 N.E.2d at 782 (Moyer, C.J., dissenting).

The dissent cited *Nixon v. United States*[85] as controlling in this case.[86] Justice Moyer claimed, without citing specific constitutional text for support, that the term "'thorough and efficient' is a question of quality . . . that the Ohio Constitution leaves to the legislature to determine."[87] He also attempted to use the "lack of judicially manageable standards" text in *Nixon* to render the question of education financing nonjusticiable.[88]

The majority, however, agreed that it is not the court's place to tell the legislature exactly how to fund the state's schools.[89] While the court may not choose to tell the legislature what "thorough and efficient" is, it is clear, given the facts of this case,[90] that the current state of affairs in many school districts cannot be what the framers of the Ohio Constitution had in mind.[91] In other words, the court's refusal to explicitly detail the contents of a good law does not indicate that it cannot identify a bad law. Justice Moyer's assertion that the legislature had met the Department of Education's mandate to afford a basic education to every Ohio child[92] is ludicrous. "Plaintiffs did not prove," he argued, "that any Ohio child was without a school to attend."[93] One wonders how Justice Moyer's feelings on the adequacy of Ohio's schools would change if the Ohio Supreme Court held proceedings in an unheated coal bin for a week in February.

By restricting the litigation to provisions in the Ohio Constitution, and confining the issue to interpretations of state rather than federal law, the plaintiffs in this case effectively named the Ohio Supreme Court as this matter's court of last resort, denying the defendants a solid basis for appeal to the United States Supreme Court.[94] The dissent, however, suggested that the

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[85] 506 U.S. 224, 228 (1993) (holding that courts cannot rule upon questions that are textually committed to another branch of government).

[86] *DeRolph*, 677 N.E.2d at 784 (Moyer, C.J., dissenting).

[87] *Id.* at 783.

[88] *Id.* at 784.

[89] *Id.* at 747.

[90] *DeRolph*, 677 N.E.2d at 742 (Douglas, J., concurring).

[91] The delegates to the Ohio Constitutional Convention did not want the education provided to be "mediocre." *Id.* at 740.

[92] *Id.* at 791 (Moyer, C.J., dissenting).

[93] *DeRolph*, 677 N.E.2d at 792.

[94] An appeal on a federal constitutional issue would likely have been decided in favor of the defendants. Jonathan M. Purver states that a number of federal courts have decided the question of whether inadequate school funding violates the Equal Protection clause of the Fourteenth Amendment. Jonathan M. Purver, Annotation, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R.3d 1220 (1972). The federal courts have ruled in favor of the constitutionality of the funding systems. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973). The plaintiffs, who lost in this case, successfully reasserted their claims under state constitutional grounds in Edgewood Independent School District v. Kirby, 777 S.W.2d

establishment of Ohio as the only forum for this matter did not lend any certainty or solidity to the *DeRolph* opinion.

The dissent feared that a ruling on the unconstitutionality of the state's educational funding system "will only necessitate more comprehensive judicial involvement tomorrow," requiring "years of protracted litigation."[95] The opinion then cited cases from several states in an attempt to demonstrate the difficulties with repeated appeals that have been encountered elsewhere in the nation.[96] While New Jersey, for example, may have had to deal with "protracted litigation,"[97] closer examination of the cases of other states shows that if a court is firm on its position, it can twist the legislative arm and get satisfactory results.

A court that uses the power of injunction as the whip to drive the legislature will get results.[98] The Texas Supreme Court, for example, used the injunctive whip almost immediately after finding the state's school funding system unconstitutional.[99] The Texas court had to make additional rulings only because the trial court, exceeding its authority, extended the higher court's

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391 (Tex. 1989). *Id. see, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327 (D. Ill. 1968), *aff'd*, McInnis v. Oglivie, 394 U.S. 322 (1969); Lafayette Steel v. Dearborn, 360 F. Supp. 1127 (D. Mich. 1973); Burruss v. Wilkerson, 310 F. Supp. 572 (D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

[95] *DeRolph*, 677 N.E.2d at 786 (Moyer, C.J., dissenting).

[96] The dissent notes that New Jersey has had ten cases in the last twenty-five years dealing with the constitutionality of school funding; Texas, three cases; California, four cases; and Connecticut, four cases. *Id.*

[97] New Jersey's history with school funding has shown a hesitation on the part of the judiciary to issue firm directives to the legislature. Thus, the court paid for its restraint with having to endure extended litigation. New Jersey's supreme court has ruled its school funding system to be unconstitutional in two separate sets of cases. *See* Abbott v. Burke, 495 A.2d 376 (N.J. 1985); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973). Both times, the court initially declined to take an affirmative stance on compelling legislation, either by failing to set a time limit on its decision or by passing the responsibility to another governmental entity. *See Abbott*, 495 A.2d 376; *Robinson*, 303 A.2d 273.

[98] The court enjoined the statutory distribution of public school support and compelled the enaction of the Governor's plan for provisional redistribution relief, which guaranteed funds to the schools on a per-pupil basis, unless the legislature moved quickly to come up with constitutionally sound legislation. *See* Robinson v. Cahill, 351 A.2d 713 (N.J. 1975). This, apparently, was the prod the legislature needed to get to work. The Public School Education Act of 1975 was enacted, which defined a "thorough and efficient" education, provided for monitoring and evaluation and funded the schools with a per-pupil system in mind. *See* Robinson v. Cahill, 358 A.2d 457, 463 (N.J. 1976) (citing N.J. STAT. ANN. § 18A: 7A-1 (West 1975)). In fairness to Justice Moyer, however, it should be noted that further injunctive threats were necessary to ensure full funding for the new legislation. *See id.* at 468. Also, the court had to deal with a similar constitutional challenge nearly ten years later. *See* Abbott v. Burke, 495 A.2d 376 (N.J. 1985). To date, this second battle is still going on, but the duration of this second battle may be due to the fact that the court has again refrained from taking a tough, injunction-based stance against the legislature. *See id.* at 393.

[99] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

deadline to the legislature,[100] and because the Texas legislature's penultimate attempt at creating constitutionally-sound legislation violated a different part of the Texas Constitution.[101] Today, Texas has a system of education funding that provides a basic education for all its students while also allowing richer districts to spend more on their students.[102] Texas's success, and the speed of that success, should form the goal to be sought in Ohio as well.

VI. CONCLUSION

In the short time since *DeRolph*, the Ohio Supreme Court has already written brief additional opinions on this matter. First, the court responded to a motion for clarification by holding that local property taxes, while they could not be the primary source, could still be a source of educational revenue.[103] Second, the court held that debts incurred by schools under unconstitutional legislation were nonetheless valid.[104] Third, the court ruled that the Perry County Court of Common Pleas, not the Ohio Supreme Court, would retain jurisdiction over the matter.[105] The court also responded to a request by the Perry County Court of Common Pleas for guidance and direction in carrying out the supervision of the General Assembly.[106] Fortunately for the trial court, the General Assembly has already begun taking steps to satisfy the demands of *DeRolph*.[107] With luck, the history of New Jersey will not repeat itself.

Furthermore, there is nothing in the court's opinion that limits the scope of the General Assembly's efforts to amend those statutory provisions which were explicitly labelled as unconstitutional. The General Assembly may decide that the answer to school district poverty lies in earlier state intervention to resolve potential indebtedness.[108]

The General Assembly may have a difficult time complying with the court's wishes. To its credit, it has made attempts to create and enact constitutionally

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[100] Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991).

[101] Carrolton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 506 (Tex. 1992).

[102] Edgewood Indep. Sch. Dist. v. Meno, 893 S.W.2d 450 (Tex. 1994).

[103] DeRolph v. State, 678 N.E.2d 886 (Ohio 1997).

[104] *Id.*

[105] *Id.*

[106] DeRolph v. State, 681 N.E.2d 424 (Ohio 1997). The plaintiffs filed a motion requesting that the trial court order the defendants to follow three steps of a schedule recommended by the plaintiffs. The supreme court instructed the trial court to overrule the motion. *Id.*

[107] *See infra* note 109.

[108] While the dissent states that "[l]ocal control of public schools is a pillar of our system," *DeRolph*, 677 N.E.2d at 794 (Moyer, C.J., dissenting), that pillar, even if it were not merely illusory for some schools, may have to be brought down to ensure that certain school districts are properly managing the funds they receive.

sound legislation. A resolution was introduced on September 4, 1997, calling for the creation of two bipartisan committees dedicated to the rectification of the state's school funding deficiencies.[109] The bill instructed the committee to use the *DeRolph* decision as a guideline for its findings.[110]

The General Assembly, rather than attempting to change the flawed basic structure of the state's school funding system, has since sought to solve the schools' problems only by pouring in more money overall. In February 1998, the state legislature passed two bills, which, subject to voter approval, would have provided funds through an increase in the state sales tax[111] and a constitutional amendment allowing the state to issue bonds to finance school-building construction.[112] Both referenda were soundly defeated by the electorate on May 5, 1998.[113]

Ohio should look either to Texas or to its own past to find appropriate legislation. Texas's current version of education funding has been upheld as constitutionally sound by its supreme court.[114] Texas's funding system is one that provides a sufficient basic level of education for all of Texas's students.[115] The provision of the "basics", however, is only the first tier of a two-tiered

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[109]H.R. Con. Res. 32, 122d Leg. (Ohio 1997). The first committee, the Educational Opportunities Task Force, will determine the basic educational needs of Ohio's students and will determine the amount of money required to provide those educational needs. *Id.* The second committee, the Educational Finance Task Force, will recommend legislation (and/or constitutional amendments, if necessary) to provide funding to repair Ohio's school facilities, beginning with those that pose an immediate safety or health risk and ending with those which need renovation solely for the improvement of the process of education. *Id.*

[110]*Id.*

[111]H.B. 697, 122d Leg. (Ohio 1998).

[112]H.J. Res. 22, 122d Leg. (Ohio 1998).

[113]The sales tax issue lost by nearly a four-to-one margin. Mary Beth Lane and Benjamin Morrison, *State Issue 2 Crushed—Tax Hike for Schools Rejected by 4-1—Issue 1 Also Loses*, PLAIN DEALER, May 6, 1988, at 1A.

[114]*Edgewood Indep. Sch. Dist.*, 893 S.W.2d at 461.

[115]*Id.* (citing TEX. EDUC. CODE ANN. §§ 16.101-16.524 (West 1995)). The system begins not with determining how much money a state wishes to spend on education, as does the current Ohio system, but with the amount of money that is actually needed to educate a child. *Id.* (citing TEX. EDUC. CODE ANN. § 16.002(b)). All a school district need do to qualify for basic aid sufficient to educate its children is to tax at a rate of $.86 per $100.00 of taxable property value. *Id.* (citing TEX. EDUC. CODE ANN. § 16.252). This would equal 8.6 mills of tax effort, as contrasted with the twenty mills necessary for an Ohio school district to qualify for state aid. OHIO REV. CODE ANN. § 3317.01(A) (Banks-Baldwin 1996). The state then makes up the difference between the actual taxes raised and the total money that the district should have based on the statutory allotment per pupil. *Edgewood*, 893 S.W.2d at 461 (citing TEX. EDUC. CODE ANN. § 16.254). In this respect, the Texas plan resembles the "equal yield" formula provision that was favored by the *Walter* court. Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979).

funding system. Once the state has assured that each pupil will receive the funds necessary for a sufficient basic education, it allows wealthier districts to spend more on their pupils.[116]

An essential component to the success of remedying Ohio's school funding problems is the unification of the court under the banner of the *DeRolph* majority. Those who were in the dissent, having voiced their views and having lost the debate, must accept the ruling of the majority in order to ensure the General Assembly's vigilance. The New Jersey court has been dealing with the problem of school funding for over twenty years.[117] In twenty years, it is practically certain that the makeup of the Ohio Supreme Court will change. How would the General Assembly respond to the court's decrees if it thought that the next justice to rise to the court will simply join the current dissenters and overrule *DeRolph*? A unified court will allow *DeRolph*'s requirements to stand the test of time and move the General Assembly to provide the needs of all of Ohio's students. The court can also benefit from the mistakes of New Jersey (as well as the example of Texas) by moving quickly to establish an injunctive deadline to force the General Assembly's diligence.

There is more to the problem of Ohio's schools than the amount of money that is given to the cause of education. The court recognizes that "money alone is not the panacea that will transform Ohio's school system into a model of excellence."[118] "The General Assembly cannot write a statute, and we cannot write an opinion, that requires parents to love their children, [or] to provide proper nutrition for their children, to challenge and nurture their children. . . ."[119] The message sent by the *DeRolph* court, however, is clear. Without the necessary funds for education, a "thorough and efficient" system is impossible, and providing necessary funds is the constitutionally delegated duty of the General Assembly. That responsibility has not yet been met.

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[116] *Edgewood*, 893 S.W.2d at 461 (citing TEX. EDUC. CODE ANN. § 16.301). For each additional cent of tax effort (up to a total tax effort of $1.50 per $100.00 of taxable property value), the state guarantees an additional yield of $20.55 per student, again making up the difference when a district's actual tax collection fails to provide that yield. *Id.* (citing TEX. EDUC. CODE ANN. § 16.254). These two aspects of the new Texas system have been present in prior legislation found to be unconstitutional. It is the inclusion of a spending cap that satisfied the Texas Supreme Court. *Id.* In Texas, there is a limit on the amount of property value per student that a district can have. *Id.* (citing TEX. EDUC. CODE ANN. § 36.002). If a district's taxable property value per student exceeds $280,000.00, the district must bring its taxable property within the limit, either by educating students from other districts, detaching property from its own district or consolidating with another district. *Edgewood*, 893 S.W.2d at 461 (citing TEX. EDUC. CODE ANN. §§ 36.003-.004).

[117] Abbott v. Burke, 693 A.2d 417, 421 (N.J. 1997).

[118] *DeRolph*, 677 N.E.2d at 746.

[119] *Id.* at 781 (Pfeiffer, J., concurring).